No. 92-428

DEC 9 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1992

STANLEY V. GRAFF, PETITIONER

v.

BANK ONE, TEXAS, N.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the bar on enforcement against federal bank regulators of secret side agreements made with the failed bank, established by this Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), precludes petitioner's argument that he was not obligated to make payments on a facially enforceable promissory note because representatives of the failed bank instructed him not to do so.

2. Whether officials of the failed bank were "debt collector[s]" for purposes of 15 U.S.C. 1692a(6).

3. Whether the district court erroneously relied on affidavits in granting summary judgment against petitioner on his claims of unfair debt-collection practices.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-21) is unpublished, but the judgment is noted at 963 F.2d 371 (Table). The opinion of the district court (Pet. App. 49-69) and a related opinion issued by the Texas state court before the case was removed to federal court (Pet. App. 22-29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1992. A petition for rehearing was denied on June 11, 1992. Pet. App. 36-37. The petition for a writ of certiorari was filed on September 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1985, petitioner executed a promissory note in favor of MBank Grand Prairie for $4,050,000 to finance a real estate purchase. When petitioner failed to make payments in accordance with the terms of the note, MBank Dallas, N.A. (an affiliated entity to whom the note had been negotiated) sued petitioner in a state district court in Dallas County, Texas, seeking the balance due. In March 1989, the Office of the Comptroller of the Currency declared MBank Dallas insolvent and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. Pursuant to a Purchase and Assumption Agreement between the FDIC in its capacity as receiver and the Deposit Insurance Bridge Bank, N.A. (later renamed Bank One, Texas, N.A.), Bank One acquired certain assets of MBank Dallas, including the note in question. Bank One intervened in the state-court action and moved for summary judgment. Petitioner responded by asserting affirmative defenses of waiver and estoppel, based on allegations that representatives of MBank had instructed him not to make payments on the note. He also asserted counterclaims based on alleged violations of the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.* (FDCPA), as well as common-law unfair debt collection claims, relying on the allegation that officials of MBank approached his father and asked him to pay amounts due under the note. Pet. App. 4-6, 15, 38, 50-55.

2. On September 18, 1989, the state district court granted an interlocutory summary judgment for Bank One, holding petitioner liable on the note, but refraining from disposition of petitioner's counterclaims. Pet. App. 22-29.

3. The FDIC and Bank One subsequently removed the case to the United States District Court for the Northern District of Texas and moved for summary judgment on petitioner's counterclaims. In June 1991, the district court granted summary judgment for respondents, rejecting petitioner's counterclaims. Pet. App. 49-69. The court first rejected petitioner's claim under the FDCPA (*id.* at 61-62) based on its view that the loan was for business purposes, rather than for personal, fam ily, or household purposes. See 15 U.S.C. 1692a(5) (limiting the definition of "debt" under the FDCPA to loans "primarily for personal, family, or household purposes"). The court rejected the common-law debt-collection claims (Pet. App. 62-65) as barred by *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942). On July 23, 1991, the district court formally adopted the Texas state court's judgment on Bank One's claim against petitioner. Pet. App. 30-33.

4. The court of appeals affirmed. Pet. App. 3-21. The court rejected petitioner's defenses to payment of the note as barred both by this Court's decision in *D'Oench, Duhme*, and by its statutory progeny, 12 U.S.C. 1823(e) (1988 & Supp. III 1991) and 12 U.S.C. 1821(n)(4)(I) (Supp. III 1991). The court explained that petitioner's contention that MBank officials instructed him not to make interest payments would establish that he "lent himself to a scheme that mislead [*sic*] the FDIC and Bank One regarding the worth of the note held by M-Bank, because a note without interest is less valuable than a note with interest. The alleged agreement to forego [*sic*] interest was not recorded, and there was no way for FDIC examiners to determine the existence of such an agreement." Pet. App. 11-12. Accordingly, the court concluded that petitioner's defenses were barred.

The court also affirmed the district court's grant of summary judgment on the FDCPA claim. Pet. App. 15-16. The court noted that the FDCPA applies only to a person who "collects or attempts to collect * * * debts owed or due * * * [to] another." 15 U.S.C. 1692a(6). Because MBank owned the note at the time its representatives were alleged to have attempted to collect from petitioner's father, summary judgment on the FDCPA claim was appropriate.

Finally, the court affirmed the district court's grant of summary judgment on the common-law debt-collection claims. Pet. App. 16-20. The court noted that petitioner had proffered no admissible evidence that MBank personnel attempted to collect the debt from petitioner's father, "much less that they were unreasonably attempting to do so." *Id.* at 19. Hence, the court concluded, petitioner's allegations did "not allege acts * * * that rise to the level sufficient to state a claim under Texas common law for unreasonable collection efforts." *Id.* at 20.

ARGUMENT

1. Petitioner first argues (Pet. 24-36) that the court of appeals erred in applying *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), to bar his defenses of waiver and estoppel. The substance of his argument is that *D'Oench, Duhme* bars only secret agreements, and that this case does not involve a secret agreement, but instead a "direct *instruction* from a banking officer to a borrower," Pet. 28. Petitioner's argument is meritless.

In *D'Oench, Duhme*, this Court refused to allow a borrower sued by the FDIC on a note it acquired as receiver of a failed bank to assert as a defense the claim that the note was given "with the understanding that no suit would be brought thereon." 315 U.S. at 456. The Court

adopted a federal common-law rule allowing federal banking regulators to enforce notes in the face of certain defenses not apparent on the face of the note, relying on the need of regulators to determine the "genuineness of assets ostensibly held by a bank." *Id.* at 460. The Court explained that the doctrine would bar a maker's defenses whenever "the maker lent himself to a scheme or arrangement whereby the banking authority * * * was likely to be misled." *Ibid.*[1] As the court of appeals noted, petitioner's allegation that he was directed not to pay

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[1] Congress supplemented *D'Oench, Duhme* by enacting 12 U.S.C. 1823(e) (1988 & Supp. III 1991), which provides that no "agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it * * * shall be valid against the [FDIC] unless such agreement * * * is in writing, [signed by the bank and contained in the bank's official records]." Congress extended the same protections to bridge banks like respondent Bank One in 12 U.S.C. 1821(n)(4)(I) (Supp. III 1991). Petitioner contends (Pet. 35-36 & nn. 34-35) that Section 1821(n)(4)(I) does not apply to this case because it was enacted after the note was transferred to Bank One. Because the judgment of the court of appeals rested alternatively on the common-law principles articulated in *D'Oench, Duhme* and the statutory bar set forth in Section 1821, the question whether Section 1821 applies retroactively would not be squarely presented unless the Court concluded that the common-law principles articulated in *D'Oench, Duhme* were inadequate to support the judgment. Petitioner does not suggest that the statutory provisions have preempted *D'Oench, Duhme*'s common-law rule, see *FSLIC* v. *Griffin*, 935 F.2d 691, 698 (5th Cir. 1991) (12 U.S.C. 1823(e) is "an adjunct" to *D'Oench, Duhme*), cert. denied, 112 S. Ct. 1163 (1992), and also does not question that *D'Oench, Duhme*'s protections are available not only to the FDIC, but also to subsequent holders like respondent Bank One, see *Bell & Murphy & Assocs.* v. *InterFirst Bank Gateway, N.A.*, 894 F.2d 750, 754-755 (5th Cir.), cert. denied, 111 S. Ct. 244 (1990); *FDIC* v. *Newhart*, 892 F.2d 47, 50-51 (8th Cir. 1989).

interest on the note would establish that petitioner lent himself to an arrangement likely to mislead banking regulators about the value of the note. Petitioner cites no support for his contention that he can evade the rule of *D'Oench, Duhme* simply by characterizing the bank officer's alleged statement as an instruction (on which he relied, and with which he apparently agreed) rather than a mutual agreement. Such a rule would eviscerate the holding in *D'Oench, Duhme* by placing control over its application squarely in the hands of the borrowers against whom the doctrine is directed. Accordingly, there is no basis for review of petitioner's *D'Oench, Duhme* claim.[2]

2. Petitioner next argues (Pet. 37-44) that the Fifth Circuit erred in granting summary judgment on his claim under the FDCPA even though the district court believed there was a fact question as to whether MBank engaged in activity that constituted unfair debt collection practices proscribed by the FDCPA. The problem with that argument, however, is that it ignores the court of appeals' conclusion that the MBank employees were not covered by the FDCPA because they were collecting

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[2] For that reason, petitioner's argument (Pet. 26) that the court of appeals' analysis of the *D'Oench, Duhme* claim deprived him of due process and his right to trial by jury is meritless. The decision in *D'Oench, Duhme* predated execution of the note by more than four decades. Petitioner's failure to familiarize himself with its requirements before relying on the bank officer's alleged oral representations does not raise a serious constitutional question. See *Campbell Leasing, Inc.* v. *FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990). Nor did the district court deprive petitioner of his right to trial by jury when it determined that a trial was unnecessary because there were no genuine issues of material fact under the relevant legal principles.

a debt of MBank itself, rather than the debt of "another." Because the employees therefore were not "debt collector[s]" within the meaning of 15 U.S.C. 1692a(6), petitioner's claim under the FDCPA necessarily fails, without regard to whether the activities of the employees otherwise would have violated the FDCPA.

To the extent petitioner addresses the reasoning of the court of appeals (Pet. 42-44), he offers only the fact-specific contention that respondents failed to satisfy their burden of proving that MBank was the owner of the note at the time of the collection activities. That contention, however, ignores the fact that it was petitioner, and not respondents, who raised the FDCPA claim and thus had the burden of proof. In order to defeat summary judgment on that claim, petitioner was obligated to offer materials from which the court could discern a genuine issue of material fact as to whether MBank was collecting the debt of another. But petitioner never even alleged that MBank was not the owner of the note at the time. Instead, he has simply argued that respondents failed to offer conclusive evidence of MBank's ownership. Petitioner offers nothing to suggest that the court of appeals' treatment of this matter raises a question of general legal significance.[3]

3. Finally, petitioner argues (Pet. 45-59) that the district court erred in granting summary judgment on the unfair debt-collection claims because respondents failed adequately to establish that the individuals who submitted certain affidavits on behalf of respondents had per-

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[3] Moreover, he offers nothing to suggest error in the district court's dismissal of the claim as barred because the note did not represent a "debt" for purposes of 15 U.S.C. 1692a(5).

sonal knowledge of the matters stated in the affidavits. Those affidavits, however, were not relevant to the judgment of the court of appeals, which rested not on the sufficiency of respondents' factual submissions, but on the legal conclusions that (a) petitioner's FDCPA claim failed because MBank was collecting its own debt; and (b) petitioner's common-law claim failed because he did not allege acts of sufficient egregiousness to state a cause of action. Pet. App. 15-20. Petitioner acknowledges that the Fifth Circuit did "not even address [petitioner's] contention that the affidavits of Bank One and FDIC-Receiver are legally and substantively deficient." Pet. 54. Because the court of appeals had no occasion to consider petitioner's claim, it is not suitable for review in this Court. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984). In any event, petitioner offers no issue of general significance in his contention that the affiants in this case did not have sufficient personal knowledge to justify the district court's decision to credit their affidavits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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